IN THE

UNITED STATES COURT OF APPEALS

FOR THE INDIAN TERRITORY.

JUNE TERM, 1903.

ROBERT FORTUNE, Appellant,

vs.

THE INCORPORATED TOWN OF WILBURTON, I. T., Appellee.

APPEAL FROM THE UNITED STATES COURT FOR THE CENTRAL DISTRICT, SITTING AT SOUTH M'ALESTER, I. T.

BRIEF FOR APPELLANT, ROBERT FORTUNE.

IN THE

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ROBERT FORTUNE, Appellant,

vs.

THE INCORPORATED TOWN OF WILBURTON, I. T., Appellee.

Appeal From the United States Court for the Central District of the Indian Territory.

BRIEF OF APPELLANT.

STATEMENT.

On April the 6th, 1903, Robert Fortune, the appellant, was arrested by the town marshal of the incorporated town of Wilburton, I. T., and brought before J. W. Wade, mayor of said town at Wilburton, I. T., charged with the crime of violating ordinance number 3 of said town, which is entitled "An Ordinance Relating to the Public Peace," and thereafter, to-wit, on the 13th day of April, 1903, was tried for said offense, found guilty and sentenced to pay a fine of $10.00 and the costs of the action; that thereupon the appellant executed an appeal bond, which was approved by

the mayor of said town, and appellant prayed an appeal, which was granted, and that thereupon appellant demanded of said mayor a transcript of the proceedings in said cause; that the mayor furnished appellant what purported to be a transcript of the proceedings in the cause, but in fact, was only transcript of the judgment, the affidavit of W. H. Royce, the warrant issued in the cause and the appeal bond. That appellant on May 4th, 1903, filed said transcript in the United States Court in the Central District of the Indian Territory, at South McAlester; that the mayor's certificate to transcript only certifies judgment, statement of cost and warrant issued in said cause, but attaches to said certified record a copy of the affidavit and the appeal bond, all of which were filed as part of the transcript in the said United States Court. That on July 3rd, 1903, during the May term of said court, appellee filed a motion to dismiss the appeal; that thereupon, appellant discovering that the whole record in said cause had not been certified to said United States Court by the said mayor, tendered and asked to be filed a motion to require the said mayor to certify to said United States Court a transcript of all proceedings had in said cause, and that thereupon on July 3rd, 1903, said cause came on to be heard upon the motion of appellee to dismiss the appeal in this cause, which motion the court sustained on the ground that the appellant had not made the affidavit of appeal before the mayor, as required in civil causes from a justice of the peace to circuit courts, and dismissed the appeal; that the appellant then prayed an appeal to the United States Court of Appeals for the Indian Territory, which appeal was granted by the trial court, and thereafter during the same term of court, to wit: on the 27th day of August, 1903, appellant prepared and presented to said trial court

bill of exceptions, which was approved and signed by the judge of said court on said date; thereafter on the 29th of August, transcript being obtained from the clerk of said trial court, same was presented to the Hon. Joseph A. Gill, United States Judge for the Northern District of the Indian Territory, for the allowance of an appeal, which was granted on said date, and thereafter, on the 31st day of August, 1903, filed in the United States Court of Appeals for the Indian Territory. Proper exceptions were saved and taken to the ruling of the court below.

ASSIGNMENT ERROR.

1st. The court erred in not permitting to be filed and sustained the motion tendered and requested to be filed by appellant to require the mayor of the incorporated town of Wilburton, I. T., to certify to and send up a complete transcript of all proceedings had in this cause before him.

2nd. The court erred in finding that no affidavit of appeal had been made and filed by appellant in the mayor's court.

3rd. The court erred in holding that an affidavit of appeal in mayor's court was necessary and prerequisite to jurisdiction in United States Court in the Indian Territory.

4th. The court erred in holding the prosecution in this cause to be a civil action, and that the law of civil procedure in appeals from justice of the peace (commissioners) to the United Staees Courts in the Indian Territory applied to this cause.

5th. The court erred in sustaning the motion of appellee to dismiss the appeal in this cause.

6th. The court erred in not permitting the appellant to file affidavit of appeal in the said United States Court, as requested by appellant.

ARGUMENT.

The record certified toand sent up to the United States Court in this cause is not a complete record of the proceedings had before the mayor of the incorporated town of Wilburton, I. T. The mayor certifies that the record sent up is a true, complete, perfect transcript from his docket of the judgment, statement of costs and a complete copy of the warrant in this cause. There is nothing upon the face of the record to show what proceedings were had in his court after the judgment was rendered. Whatever proceedings were had in the mayor's court after the judgment was rendered, and whatever record was made thereof, he does not pretend to certify to the United States Court, nor is his certified transcript, in fact, a complete record of the proceedings before him. The judgment certified to the United States Court expressly shows that there was made and filed, an affidavit charging appellant with a crime, and an affidavit for a change of venue, yet neither of these affidavits are certified to the United States Court, thereby showing, in addition to his certificate, that his record certified and sent up is not a complete record of the proceedings had before him in this cause. Then, for the United States Court to conclude that no affidavit of appeal had been made and filed before the mayor without the record or some evidence before him, was error, nor was it necessary for the appellant in the United States Court to have produced evidence that an affidavit of appeal had been made before the mayor until a complete transcript of the proceedings before him were certified to the United States Court so that from the record the court might be able to determine that fact.

Therefore, it seems to me, that the court before sustaining a motion to dismiss the appeal should have per-

mitted the motion to require the mayor to certify to the United States Court a complete transcript of the proceedings before him to the United States Court to have been filed and sustained. The mayor certified no orders or proceedings made or entered after the judgment was rendered, and the court had nothing upon which to find or conclude that an affidavit of appeal had not been made.

The court, however, did find that no affidavit of appeal had been made, and filed and decided the motion to dismiss upon the theory that proceedings before the mayor's court of incorporated towns are civil proceedings and are governed according to the law of civil proceedure, and that in appeals from inferior courts to United States Court in the Indian Territory, affidavit of appeal is required, and a prerequisite to the jurisdiction of the United States Court.

The only provision of the law in force in the Indian Territory that requires an affidavit of an appeal from any court to a higher court is the provision found in Mansfield's Digest, section 4135, providing for appeals in civil causes from Justice of the Peace, (Commissioner's Court) to Circuit Court, (United States Court.)

Then to hold that an affidavit of appeal is a prerequisite to the jurisdiction of the United States Court is to hold, 1st. That the action is a civil suit; 2nd. That the appeal from the Mayor's Court must be effected as provided for in (Section 4135, M. D. Supra) appeals from Justice of the Peace in civil causes.

As to the question whether the prosecution for violation of an ordinance by an incorporated town or city is a criminal prosecution or a civil action, the authorities throughout the United States are so nearly equally divided that it is impossible to harmonize them, or to conclude that the

weight of authority is one way or the other. In some of the states it is held to be a civil action, as in Colorado, Georgia, Louisiana, New Jersey, Oregon, South Carolina, Dakota, Wyoming and others. On the other hand, many of the states have regarded it as a criminal prosecution, as in Iowa, Kansas, Kentucky, Massachusetts, Mississippi, New Hampshire, Vermont, West Virginia and others. In many of the states it is held to be both civil and criminal. If the action is purely for the recovery of a penalty for the violation of an ordinance not a public offense it is held to be a civil action, but where the prosecution is for an offense the punishment for which is also provided by the laws of the state, or is a public offense in its nature, they hold that it is a criminal prosecution, as in California, Connecticut, Illinois, Michigan, Minnesota, Missouri, Nebraska, New York, North Carolina, Ohio, Wisconsin and others.

The position of the different states upon this question are collected and thoroughly discussed in 15 Ency. P. & P., 412; Dillon on Municipal Corporations, 1st Vol. section 411, so we make no further comment upon the decisions of the different states of the Union for it seems clear that the question must be determined by the laws and the decisions of the courts which apply directly to this jurisdiction.

The laws of the State of Arkansas as found in Mansfield's Digest in regard to municipal corporations are extended over and put in force in the Indian Territory, Curtis bill, Sec. 14, Ind. Ter. Statutes, Sec. 57z4.

The ordinance under which the case at bar is prosecuted is entitled "An Ordinance Relating to the Public Peace (see R. Ordinance No. 3) which is subdivision XXXIV of Chap. 45 M. D. sections 1796 to 1808 relating to riots, affrays and disturbing the public peace slightly modified and changed, and while the wording of the particular section of the ordin-

ance under which this cause is apparently prosecuted is slightly different from the wording of the statute, yet the same charge would be an offense under the statute and as to being a public offense there can be no doubt whatever. Therefore this ordinance would come within the line of decisions holding that the violation of an ordinance punishing a public offense is a crime and thus the criminal procedure would apply and in regard to such offenses this is the decided weight of authority upon that subject.

15 Ency. P. & P. 412.

1 Vol. Dillon on Municipal Corporations Sec. 411.

In Re. Rolfs Petitioner, 30 Kan. 758; 4 Am. Cr. Rep. 446.

In the case at bar an affidavit was made charging the defendant with the commission of a crime, a warrant issued, and defendant was arrested and brought before the mayor in charge of the town marshal, he gave bail bond for his appearance till the cause could be tried, he was tried by a jury of 12 men and found guilty, and sentenced to pay a fine. Was this criminal procedure? Who can doubt it?

The city is given power to ~~make ordinances providing for the~~ procuring a warrant for the arrest of those violating ordinances as in criminal prosecutions.

M. D. Secs. 2358, 2362, 2366.

The town of Wilburton has an ordinance providing for the imprisonment of parties fined who fail to pay the fine. (R. p. 7.) Then if it is a debt or penalty to be recovered by civil action the party can be imprisoned for that debt if he refuses to, or can not pay the debt.

Power is given the cities and towns to pass ordinances that parties violating those ordinances may be imprisoned, and may require them to work on the streets, should they fail or be unable to pay the fines assessed against them by

such cities and towns.

M. D. secs. 745, 748, 927.

The prosecutions for the violation of ordinances of incorporated towns and cities have been treated by the laws in force in this jurisdiction as criminal prosecutions. The offense is defined, by ordinance and statute, as a MISDEMEANOR and the punishment a FINE. Both words have a clear technical meaning which apply to criminal offenses.

M. D. sec. 1494, 1966, 766 to 770.

16 Ency. P. & P. 234 and cases cited.

People vs. Craycroft, 56 Am. D. 331.

Hanscomb vs. Russell, 77 Mass. 373.

The Supreme Court of Arkansas, in passing upon ordinances, has not only treated the violation of ordinances by its use of technical criminal terms, such as fine, punishment, crime, misdemeanor, etc., as criminal prosecutions, but in many cases has that court, in deciding the question of being twice put in jeopardy for the same offense for violating a city ordinance and a statute of the state, held that the offense was a crime against both governments, the one the city and the other the state, and in no instance has that court based the decision upon the theory that the violation of the city ordinance is a civil action and that the party was not in jeopardy, inferentially holding that such parties were in jeopardy, but having violated the criminal laws of two governments it is not being twice put in jeopardy for that reason.

Van Buren vs. Wells, 53 Ark. 368.

Thomas vs. Hot Springs, 34 Ark. 553.

Mena vs. Smith, 64 Ark. 363.

M. D. Sec. 1494.

McClains Cr. Law, 1st Vol. Sec. 17 to 21.

16 Ency. P. & P., 234 and cases cited.

The trial court appeared to be influenced to a great degree in his judgment by section 2470 of M. D., which provides, "Where the prosecution is by penal action the appeal shall be similar in all respects to appeals in civil actions." We contend that this section of the statute is not applicable for several reasons. First, before this section is applicable the suit must be by penal action which is synonomous with civil suit as used in this connection, and in the case at bar the city, under section 769 M. D. herein after referred to might have brought a civil suit instead of prosecuting the defendant criminally, but it elected to prosecute the defendant criminally, and having made the election the city is bound by it and the criminal procedure must necessarily apply, and the city having proceeded as in a criminal action can not now consistently contend that the defendant must follow the civil procedure. Second. This section does not apply to the case at bar for a much stronger reason, that is, that it is a provision with reference to appeals in penal actions from the Circuit Courts of Arkansas to the Supreme Court of that state and made the civil procedure of appeals from the Circuit Court to the Supreme Court apply to such cases, and they certainly did not, in enacting this section, have reference to the provision requiring an affidavit in an appeal from the Justice of the Peace to the Circuit Court, and if it did then an affidavit would be necessary in such cases in appeals from the United States Courts to the United States Court of Appeals in the Indian Territory, which is never done. The civil procedure in an appeal from the Circuit Court to the Supreme Court does not require an affidavit of appeal, M. D. section 1268 to 1278, then if that procedure applies to the case at bar no affidavit is required.

The law with reference to the procedure before city

and police courts which have exclusive original jurisdiction to enforce ordinances is placed in the chapter on criminal procedure, indicating that the legislature considered the procedure to enforce ordinances criminal in its nature, M. D. Chap. 46, sub-division XXII, section 2355, et. seq.

The legislature, however, went further in regard to the procedure upon the question as to whether the enforcement of an ordinance is a criminal action or a civil suit; in chapter 46 on criminal procedure, sub-division XXII "Procedure in Police and City Courts," section 2356 M. D., it is provided that the procedure in Circuit Courts for the trial of criminal cases so far as applicable shall govern the proceedings of city and police courts except as herein provided." So there can certainly be no question but that the legislature intended that the procedure in police and city courts should be a criminal prosecution so far as the procedure was concerned, at least it was to be followed. Section 769 M. D., in chapter on municipal corporations provides that "in addition to ~~the~~ any other mode provided for the recovery of penalties and forfeitures that they may be recovered by suit or action," and this would mean unquestionably, I think, a civil suit or action, but if the proceed ure for the violation of ordinances is a civil action, why the necessity of using the words "In addition to any other mode."

If here were no other method of procedure than a civil suit certainly the legislature used words that are misleading and have no meaning whatever, except to mislead, and this section relates exclusively to ordinances. It is a well settled principle of construction that a statue must be given such construction as to give effect to each word, phrase and sentence.

It seems to me that the method of procedure in ap-

peals from the Mayor's Court to the United States Court has been settled beyond all controversy; section 797 M. D., in regard to appeals from Mayor's Courts provides that "appeals may be taken in the same manner as from decision of Justices of the Peace." It will be noticed that this provision does not confine the appeal to be taken in the manner provided for appeals from the Justices of the Peace in civil actions, nor to appeals from the Justices of the Peace in criminal causes not limiting to the one nor to the other, and certainly if the legislature had intended that one and not the other method of procedure should apply to the Mayor's Court it would have confined the procedure to that method. But there being two methods of appeal from the Justice of the Peace provided by law, the legislature must have intended that if it was a criminal prosecution the appeal from the Mayor's Court should be taken according to the method provided for appeals in criminal causes, and if a civil suit, the method provided for in civil cases. And the legislature must have considered that the violation of ordinances could be enforced by either a criminal action or by a civil suit.

Appeals in criminal prosecutions from the Justices of the Peace are taken by giving a bond of appeal, to be taken within sixty days, and NO AFFIDAVIT of appeal IS REQUIRED, M. D. chap. 46, subdivision 28, sec. 2432, et seq., entitled "Appeals to Circuit Court in Criminal Cases." Appeals in civil cases are taken by making affidavit of appeal and giving bond, the appeal to be taken within 30 days, Chap. 91, M. D., sec. 4135.

In the case at bar an AFFIDAVIT for a WARRANT was MADE and a WARRANT was ISSUED, the defendant PLACED UNDER ARREST and brought before the Mayor IN CUSTODY of an officer, and was PROSE-

CUTED for a CRIME, a jury of 12 men empanelled to try the cause and a FINE ASSESSED against the defendant (R. 1 to 4), thereby leaving no question but that the city acted under the procedure for the trial of criminal causes. The Supreme Court of the state of Arkansas has decided that the prosecution upon an ordinance to regulate trade, and which is not a public offense, and which is not otherwise an offense against the laws of the state, is a QUASI CRIMINAL prosecution (Taylor, Cleveland & Co. vs. City of Pine Bluff, 34 Ark., 603), and on page 606 of the decision, in discussing ordinances, uses the following language: "They are quasi criminal and are not directed to the specific object of collecting the tax or exaction, but claim to punish and to collect fines and penalties which are different from the fees of weighing," and upon this question it seems to me that court, upon the very law under which the defendant was prosecuted, has forever settled the question that the appeal must be taken as appeals are taken from the Justices of the Peace in CRIMINAL CAUSES, and NO AFFIDAVIT of APPEAL is required.

Ullery vs. Town of Ft. Smith, 35 Ark., 214.

In this case one Charlotte York was convicted before the mayor of Ft. Smith for the violation of an ordinance of the town (and I infer from the language used that it was not an offense against the laws of the state, or at least it was treated purely and solely a violation of a city ordinance.) She appealed to the Circuit Court of the state by giving the appeal bond, as required by the laws of the state as found in Gant's Digest, section 2104 which is substantially the same as found in Mansfield's Digest, section 2435, providing for appeals in criminal cases from Justices of the Peace to Circuit Court; in the Circuit Court she was again tried and convicted, the judgment not being paid a summons

issued against the sureties on the appeal bond; the bondsmen appeared and demurred to the cause of action for the reason that the court had no jurisdiction of the cause, and second that the summons did not state facts sufficient to constitute a cause of action, thereby raising the identical question that is raised in the case at bar i. e. that the court had no jurisdiction of the action, and the Supreme Court held that the court did have jurisdiction and acquired that jurisdiction in the same manner that the appeal was taken in the cause at bar, and the court in passing upon the question makes use of this language:

"That when a defendant appeals from the judgment of a Justice of the Peace in a criminal case he shall cause to be executed by good sureties a covenant to pay the costs of appeal in the event of the affirmance of the judgment; and if he desires to suspend the collection of the judgment a further covenant to pay the judgment which may be rendered against him on the appeal." It will be noticed that the court refers to the provisions for an appeal from a Justice of the Peace in a criminal case, and it will be remembered that the appeal was from a mayor as in the case at bar; thereby specifically holding that the criminal procedure of appeals from Justices of the Peace was to be followed in an appeal from the mayor for the violation of a city ordinance.

The provision in Gant's Digest, section 2104, referred to by the court, has been reformed to some extent as now found in Madsfield's Digest, section 2435, but the provisions are substantially the same in both Digests, however, the prevailing idea is that the appeal from the mayor must be by the method of appeal from a Justice of the Peace in criminal cases.

Nor can it be maintained that the question of jurisdiction only went to the suit on the bond. If the court had no jurisdiction of the cause against Charlotte York, which was appealed to the Circuit Court in the identical manner as the case at bar—was appealed from the Mayor's Court to the United States Court—then it had no jurisdiction to render judgment against her bondsmen, because they only undertook to pay in the event of a judgment being rendered against her in the Circuit Court, and if the court had no jurisdiction to affirm the judgment of the Mayor or to render judgment against Charlotte York, then no judgment could have been rendered against her bondsmen, and therefore this very question was before the court and the court decided that it had jurisdiction of the cause.

We therefore very respectfully submit that this decision settles the question absolutely, and that the court below committed error in dismissing the appeal and that the cause should be reversed and remanded.

Very respectfully submitted,

JAMES S. ARNOTE,

Attorney for Appellant.

It is hereby agreed by the undersigned attorneys in the matter of Fortune, appellant, vs. Town of Wilburton. that the ordinance, No. 3, of the Town of Wilburton, Indian Territory, under which the appellant was prosecuted shall be made a part of the transcript in the said matter in connection with the other ordinances now in the bill of exceptions.

This 30 day of September, 1903.

J. S. ARNOTE,

Attorney for Appellant.

G. L. ANDREWS,
Attorney for Appellee.

It was agreed that the following is a true copy of ordinance No. 3, under which the appellant was prosecuted:

An Ordinance Relating to the Public Peace.

Be it ordained by the town council of the incorporated town of Wilburton, I. T.

Sec. 1. That it shall be a misdemeanor to do or cause to be done, any of the following acts, and any person convicted thereof before the mayor, shall be fined not more than $25.00.

Sec. 2. To be drunk or disorderly in any public or private place within the town limits.

Sec. 3. To keep a disorderly house or place of public resort in the open air, or by making or causing to be made therein loud or improper noises, or by collecting therein or permitting the collection therein or allow to remain therein drunken, disorderly and noisy persons, to the annoyance of others and to the disturbance of the neighborhood. To give admission or cause to be given admission therein women of known ill-repute, or prostitutes, or fail to remove or expel such persons after being notified of their character.

Sec. 4. To employ and devise, noise or performance tending to the collection of persons on the streets or other places, to the obstruction of the same, or to exhibit any tricks of legerdemain or other devices of like kind, or to perform with bells or organs or other instruments on any of the streets or public squares; provided, that this section shall not affect exhibitions, performances or the sale of any article or articles permitted—upon the payment of a license as provided in any ordinance of the town.

Sec. 5. To wilfully give or make a false alarm of fire.

Sec. 6. To resist any member of the town marshal's force in the discharge of his duty, or in any way interfere with or hinder or prevent him from discharging his duty as such member of the town marshal's force or to offer or to endeavor to do so or in any manner assist any person in the custody of any member of the town marshal's force to escape or to attempt to escape or to rescue or to attempt to rescue any person so in custody.

Sec. 7. For any driver of any vehicle who is driving one or more persons who are making a loud or boisterous noise or otherwise disturbing peace within the corporate

limits, to fail to stop his vehicle when so ordered by the town marshal or any of his deputies, and to keep the same standing long enough to enable such officer to examine the vehicle and if desired, to arrest any of its occupants.

Sec. 8. For any driver of any vehicle to drive or transport in such vehicle through or over such street or road within the corporate limits one or more persons which person or persons or driver who are making a loud or boisterous noise or using vulgar or profane language, or otherwise disturbing the peace.

Sec. 9. For the driver of any vehicle when called upon by the town marshal, or any of his deputies, to refuse to give the name of any person or persons who have been guilty of a violation of this ordinance.

Sec. 10. That if two or more persons shall by agreement fight to the terror of any citizen of the incorporated town of Wilburton the person or persons so offending shall be guilty of an affray and upon conviction before the mayor be fined in any sum not exceeding $25.00.

Sec. 11. That if any person shall willfully and maliciously disturb the peace and quiet of the Town of Wilburton, or any of the inhabitants thereof, by loud or unusual noise, or by abusive, violent or obscene language, whether addressed to the person so disturbed or some other person, or by threatening to fight or fighting, or shooting off any fire arms or brandishing the same, or by running any horses at an unusual speed along any street or alley in said town, shall be deemed guilty of a midemeanor and upon conviction before the mayor shall be fined in any sum not exceeding $25.00.

Sec. 12. That if any parent or guardian, or other person, from any cause, fancied or real, visit any school in the town and insult any teacher in the presence of his pupils, the person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof before the mayor be fined in any sum not exceeding $25.00.

Sec. 13. That this ordinance shall be in full force and effect from and after its passage and publication.

Passed and approved this the 2nd day of September, 1902.

J. F. EVANS, Mayor.

J. P. M'LARTY, Recorder.

In The

United States Court of Appeals

For the Indian Territory.

JUNE TERM, 1904

ROBERT FORTUNE, APPELLANT
VS.
INCORPORATED TOWN OF WILBURTON,
I. T., APPELLEE

#530

APPEALED from the United States Court for the Central District sitting at South McAlester, Ind. Ter.

BRIEF for Appellee, Incorporated Town of Wilburton, Indian Territory.

WILBURTON NEWS PRINT

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APPEALED from the United States Court for the Central District sitting at South McAlester, Ind. Ter.

BRIEF for Appellee, Incorporated Town of Wilburton, Indian Territory.

STATEMENT

On the 4th day of April, 1903, W. H. Royce made affidavit before the Mayor of the incorporated town of Wilburton, Indian Territory, that one Robert Fortune had

entered his, Royce's, place of busisess on that day and that the said Robert Fortune was drunk and disorderly, and that while in his, Royce's, place of business he used abusive and profane language. That complaint was filed against Fortune for violating ordinance No. 3, of said town and a writ was placed in the hands of the City Marshal to apprehend and bring Fortune before the Mayor's court forthwith. On the day of April 6th Fortune appeared before the Mayor's court and after some preliminaries the case was continued, and on the 11th day of April, 1903, the case of the Incorporated Town of Wilburton vs. Robert Fortune was tried before a jury of twelve men and the jury returned a verdict of guilty and assessed his fine at $10 and cost.

The appellant appealed from this judgment to the district court at South McAlester and the cause was set for hearing. A motion to dismiss for want of jurisdiction was made by the town of Wilburton, and on hearing the motion, the court held that the case had not been properly brought from the Mayor's court to the district court and therefore dismissed the cause; the appellant then asked that he be allowed to make the required affidavit in civil cases on appeal and the court refused the motion and the appellant then asked for an appeal to this court and therefore this appeal is brought to this court.

ARGUMENT

The assignment of error by the appellant raises only one question which can enter into this case, wanting, to-wit: That an affidavit is not required to prosecute an appeal from a Mayor's court in a case where a person has been tried for a violation of a city ordinance.

The 6th assignment of error is that the court should have allowed appellant to fill out affidavit after the motion to dismiss had been sustained.

If there is any necessity of an affidavit at all being filed, it is necessary that it should be made to the lower or mayor's court in order to get the appeal.

The question upon which the case at bar hinges is: Was this a civil or criminal suit before the Mayor's court. We agree with the appellant that the authorities are very much divided on this question.

However, the authorities differ on certain points. It seems plainly the weight of authority that where a person is convicted of certain conduct which is prohibited by ordinance, and the same conduct is not a violation of the the State law, that the action is necessary a civil action, for there is no element of a crime to it. If there was any element of a crime the statutes would put some punishment on it.

The conditions of society are such in certain places that the community has to have certain rights to protect its members.

Certain rights are given to a plainly located and

designated place. They have right to sue and be sued, to levy extra tax and to make changes in property rights, to say what kind of a house a man may build and how high, etc.

They have the right also to regulate the conduct of the members of that community,and this right and power of regulating the community is no more criminal than the right to stop a man from building a wooden house within the fire limits. Provided, a statute does not make it so. The fact that the law makers distinguished between fines that were collected by a city, when there was a violation of an ordinance which prohibited some act, which act was also prohibited by statute, and a fine or penalty for the violation of an ordinance which was not an offense against the state, is sufficient to show that the difference is there. (see Sec. 5860 of M. D. which provides that all penalties, fines and forfetures imposed by any court or board of officers, whatsoever, shall be paid into the county treasure for county purposes. Provided, that all fines and penalties of city courts or courts of incorporated towns, for violating city or town ordinances not defined as offenses against the state, may be retained by the city and town for mantaining of the courts of such city or town.) This statute shows beyond a reasonable doubt that the intention of the law-makers was to give the corporations more powers than the State at large has. Then this question arises: If the legislature restricted only by

the Constitution of the two governments under which we live does not make certain acts criminal and the organic law does not make the act criminal, then by what method of logic can you get a crime out of such conduct?

The appellant is charged with being drunk and disorderly. Sec. 2811-15 M. D. provides for the care of a drunken man and there is no criminal ones placed on such conduct.

Ordinance No. 3, of the incorporated town of Wilburton does make the act of being drunk and disorderly an offense against the corporation, and that is why the contention in this case is thus made. There is no act criminal which is not a violation of a general law. Could we say that an ordinance which made certain acts punishable with a fine was in its nature criminal, when such act were not a violation of any state law. To say they were criminal would be to say that a man can do an act in one part of the state and would be subject to a fine, but the same man could go into an other part of the state and do the same act and there would be no penalty attached to it.

Criminal statutes must be uniform throughout the state. City ordinances are not public laws, which the court can take judicial notice. (See also how the Arkansas law provides for the collection of fines, penalties and forfeitures M. D. Sec. 769).

Judge Dillion, in his work on Municipal Corporations says in substance that when the ordinance prohibits conduct not prohited by statute, the prosecution on that or-

appellant had not been found guilty, the corporation would have had the right to appeal. (see Grunfield vs. More 12 Ill. App. 283.)

This looks reasonable and could the U. S. Com. have tried the case a criminal one? Certainly not, for the same principal would hold in a case where a private corporation collected a fine from one of its stockholders for the breach of the corporate by-laws, before the same court.

It is the established law of corporations that their ordinances can be enforced only in the manner prescribed by the charter. (see Hare vs. Moyor, etc., of Albany 9 Wend (N. Y.) 571, and authorities cited in note 2, Page 260 of A. E. Ency. of Law).

Special tribunals are usually created for inforcing ordinaces, etc. The *Rules of Practice* in these tribunals are based partly upon direct statutory provisions, (as in M. D. Sec. 769), partly on custom, and partly on the by-laws of the corporation itself, but more often on an attempt to imitate the rules laid down for analogous proceedings in the state courts. The rules observed in higher courts are often wholly impracticable or inapplicable to practice before the municipal courts, but remedies under ordinances are never allowed to fail for want of tribunal, and if no special tribunal is provided action to enforce penalties may be brought in the established court of the State. (see How

and Bennis on Mun. Ord. Sec. 165, 166, McNeil vs. State (Tex) 14 S. W. Rep. 393 State vs. Johnson 17 Ark. 407). The strict and rigid rules by which the validity of penal statutes are tested are not to be applied to by-laws of a municipal corporation and the rules of proceedure in civil cases, unless otherwise provided, are applicable to it. (On this line we find in the case of Miller vs O'Reilly 84 Ind. 68) the court said, a prosecution for the violation of an ordinance of a municipal corporation is a cival action and an appeal bond given in such a prosecution, is governed by the law applicable to bonds given in ordinary civil actions.

The learned council for the appellant in his argument lays great stress on section 797 of M. D. His reasoning is sound and good as far as it goes but he does not take into consideration in his argument that the case at bar is a civil action and was in the mayor's court. The reason above shown and the authorities cited seems to me sufficient to prove that the action was a civil one in its nature from the beginning.

And in his argument on the case of Ullery vs. Town of Fort Smith he fails to make the distinction. The question in the case at bar is not touched in the case above refered to. The question of jurisdiction of the circuit court was questioned in that case, altogether the defendant claiming that the circuit court had no jurisdiction at all, our case originating in city courts. The learned council seems to be dodging the real issue. The case at bar was a

civil case before the mayor's court and should have been brought to the district court as any civil case is brought. Providing that it was a criminal case in the mayor's court and that it would be transfered on appeal to the district court as criminal case, would it have been tried in the district court as a criminal case? Could the court have placed the case for hearing on the criminal docket?

I think there is no contention that the case should not have been placed on the civil docket. 1. If then the case is tried in the district court as a civil case and is a criminal case before the mayor where are we to draw the line that separates the case and determine to which class of cases it belongs?

2. Can we say the case changed from a criminal to a civil case after the cause was removed from the Mayor's court and before it was set down for hearing in the district court? 3. Can we say the cause became a civil one from the fact that it was taken from the Mayor's court to the district court? 4. Can we say that the fact that the cause was moved from one forum to another that the nature of the cause changed?

It would be absurb to try to draw the distinction in answer to the first question for the simple reason there is no procedure under which we could change the nature of the case at bar, or any other case, for that matter. If the case was criminal before the Mayor it is necessary a criminal case before the district court the cause must have been a violation of some public law.

In answer to question three, it seems that if the case becomes a civil one from the fact that it was removed to the district court then the forum to which a case is carried would determine the nature of the case. Surely sound judgement and close investigation will prove to anyone that a cause never changes its nature. A cause may be brought in the wrong form and be changed to another court as a case in chancery brought in a court of law will be refered by the law court to the chancery court having jurisdiction of the subject matters. And you cannot say that because the case was brought in the law court that it was an action at law. The case in its inseption was of an equitable nature, and the nature never changed. Granting for the sake of argument that the cause at bar did change from a criminal to a civil action in the change from the Mayor's court to the district court, the weight of reason is in favor of this argument, to-wit: That when the cause reached judgement in the Mayor's court that the cause then became a civil one and it looks reasonable that after the cause had been disposed of in the Mayor's court by judgement that it was as much of a civil nature as it was before the district court. Of whatever nature the cause at bar may be it must necessarily be tried as a civil cause for the reason given above. (that neither party to the action was the Gov.) Now if the cause must be tried as a civil one in the district court it must have been a civil action from and after judgement was rendered in the Mayor's court.

M. D. Sec. 4135 required that an affidavit must be

made to the trial justice that the appeal is not taken for delay and that the appellant will prosecute the cause to final settlement. The statute says that no appeal shall be taken unless this affidavit is made.

M. D. 2368 provides that the provisions of law relating to pleading trial judgement and execution in the circuit court are applicable to trials in justice courts except as herein changed, etc. There is nothing said about appeals from judgement on pinal statutes. Then we turn to the rules of the circuit court and we find this statute, M. D. 2470: "Where the prosecution is by pinal action the appeal shall be similar in all respects to appeals in civil actions."

Considering these two statutes and construing them in connection with each other and reading them in the light of the other statutes quoted, and considering the authorities quoted it seems that the lower court was correct in its holding.

We therefore very respectfully submit that Sec. 2470 and 2368 of M. D. with the other statutes justifies the holding of the lower court and therefore we ask that the cause be affirmed.

CHAS. H. HUDSON,
Attorney for Appellee.